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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GARY X. NELSON,

Petitioner,

V.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the evidence in this case was sufficient to permit any rational trier of fact to find each element of the crime beyond a reasonable doubt?

2.

Whether the evidence was sufficient to permit any rational trier of fact to exclude every reasonable hypothesis save that of Petitioner's guilt?

3.

Whether Ga. Code Ann. § 27-2534.1(b)(7) permitting imposition of a death sentence upon a finding that a murder is "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" is constitutional?

4.

Whether Section (b)(7) was constitutionally applied to the facts of Petitioner's case?

5.

Whether Petitioner's contention that the trial court's jury charge conferred unbridled sentencing discretion on the jury is without merit?

6.

Whether the trial court was correct in permitting the jurors to view photographs of the victim to access whether the state had proven beyond a reasonable doubt that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim?

Whether the reading of a transcript of Petitioner's recorded statement to police did not violate his right to due process, and this contention should not now be considered as Petitioner abandoned his contention regarding alleged inaccuracies in the transcript upon appeal?

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

(i)

On October 9, 1979, Petitioner Gary X. Nelson was indicted by a Chatham County Grand Jury for the murder, aggravated sodomy and rape of Valarie Armstrong on February 19, 1978. (Record 7-9). Following a trial by jury in which the State sought the death penalty, Petitioner was found guilty as charged, (R. 64-67), and was sentenced to death on February 29, 1980, under Georgia's seventh aggravating circumstance, Ga. Code Ann. § 27-2534.1(b)(7), finding that the murder of Valarie Armstrong by Petitioner was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim, . . ." (R. 65). The Court sentenced Petitioner to two consecutive life terms for his conviction for aggravated sodomy and rape. (R. 71-72). Petitioner's motion for a new trial and amended motion for a new trial (R. 74, 77), were denied

by the trial court, (R. 85), as was the later extraordinary motion for a new trial. (R. 86).

The Supreme Court of Georgia affirmed the convictions and sentenced, Nelson v. Georgia, 247 Ga. 172, 274 S.E.2d 317 (1981) and denied a motion for rehearing on February 24, 1981.[1/]

[1/] A copy of the decision of the Supreme Court of Georgia is attached hereto as Respondent's Exhibit A.

STATEMENT OF FACTS

The victim of the murder, aggravated sodomy and rape for which Petitioner has been convicted and sentenced to death was a six year old child who resided with her mother and stepfather in Savannah. (T. 197, 203-204, 208). Petitioner was the neighbor of the victim, and knew the victim as one of the neighborhood children who ran errands. (T. 180-181, 184, 204-205).

During the morning hours of February 19, 1978, a Sunday, Petitioner began working on an automobile in the back of his residence. Not having a specific wrench to work on the car Petitioner went to the victim's parents home to borrow the needed tool. The victim's stepfather and Petitioner talked for some time while consuming Vodka, with the victim's stepfather agreeing to assist Petitioner with his automobile repairs. (T. 180, 204-205, 432, 565-568). At approximately 5:30 p.m. on February 19, Petitioner completed the initial work with the help of the victim's stepfather. (T. 182-183). Petitioner and the victim's stepfather returned to the victim's home where these two individuals consumed more alcoholic beverages.

While Petitioner and the victim's stepfather were drinking inside her house, young Valarie Armstrong was outside jumping rope and playing with some other children in the neighborhood. (T. 184). When Petitioner left the victim's house her stepfather introduced Petitioner to her, with Petitioner responding, "Yeah, I know, that's my little buddy, because she comes down to the house all the time to go to the store for us." (T. 184). Petitioner apparently returned to his house and continued to work on his automobile, but finding that there was not sufficient light he ignited a fire by which to see as he continued to work on his car. (T. 436-437, 483, 486). The victim's stepfather, noticing that Petitioner had started a fire because he was unable to see, sent his son Michael to Petitioner's house to inquire as to whether

Petitioner wanted to use his drop cord light. (T. 185, 218, 221). When the victim's brother received no answer after he knocked on Petitioner's door he went to the back yard of Petitioner's house, but did not see him there. (T. 221).

When young Valarie had not returned home by 7:00 p.m., her stepfather became concerned, and with the assistance of his other children scouted the neighborhood looking for Valarie, but she was nowhere to be found. (T. 186). The last person to see Valarie Armstrong alive on February 19, 1978, was Sabrina Williams, a playmate of Valarie's. Sabrina last saw Valarie alive just as it was getting dusk. Sabrina stated that she and Valarie had been playing and that they had gone to the store, and as they were returning from the store, Valarie said that she was going to her uncle's house. (T. 302-304, 308). However, according to Sabrina, Valarie proceeded to go into the back yard of Petitioner's house, where she noticed Petitioner standing by the automobile on which he was working. (T. 305-306, 311).

When the victim's sister came to Sabrina Williams' house to inquire about Valarie's whereabouts, Sabrina did not think it important enough to tell her sister that they had been to the store, and that Valarie had stopped at Petitioner's house on the way back. (T. 308-311). With Valarie's family unable to locate her, a missing persons' report was filed with the Chatham County Police Department. (T. 186-187, 228-229). Before the police initiated a search on their own, they talked with Sabrina Williams, and learned that Valarie had last been seen going into the back yard of Petitioner's house, as well as identifying Petitioner from a mug shot as being the individual she saw with Valarie shortly before her disappearance. (T. 312-315, 325-330).

The police search of the nearby swampy wooded area in the vicinity of the victim's neighborhood conducted during the evening of February 19, 1978, proved to be unproductive. (T. 231-

232). On the day following Valarie's disappearance Petitioner went to Valarie's house and told her stepfather that he was sorry to hear about his little girl, and inquired as to whether or not she had been found. At approximately 3:00 p.m., on February 20, 1978, the police located the body of Valarie Armstrong approximately fifty feet from the top of a bank. (T. 233). Valarie's clothes were disarrayed, one slip she was wearing protruded outside of her partially zipped pants, and there was evidence that she had been stabbed to death. A broken knife handle wrapped in masking tape and the knife blade were found near her body. There were also blood spots between the body and the ditch, as well as blood spots on a leaf of a tree. (T. 233, 235, 243, 245-248, 379).

The autopsy which was later performed on Valarie Armstrong established that the child had been vaginally, rectally and orally raped. Furthermore, the child's vagina and rectum were severely bruised, there was heavy bleeding and both the vagina and rectal area were widely stretched. The skin between the vagina and the rectum was also torn, the victim's lips were torn in the area of her teeth, and there was a white fluid consistent with semenal fluid in which spermatozoa and blood were found around the anus and the victim's vagina. (T. 291-295). The pathologist's examination of Valarie's body also revealed bruises around the neck (T. 293), and that there were multiple superficial shallow stab wounds on the right side of the chest, indicative of someone stabbing the victim lightly, either before or after the fatal stab wound in the left side of the chest. (T. 293). It was a stab wound to the left chest and to the lung which caused Valarie to bleed to death, the death taking approximately thirty minutes to ensue. (T. 293-295).

Two days after Valarie's disappearance her stepfather received an early morning telephone call from Petitioner, in which Petitioner stated, "Hey man, I know who killed your daughter." When Valarie's stepfather inquired of Petitioner as to how he

knew who had killed his daughter, Petitioner said that it was a fellow on the East side by the name of Blue. Petitioner then stated, "I can't tell you no more, cause I don't want to get involved." Petitioner then hung up the phone, at which time the victim's stepfather reported the phone conversation to the police. (T. 188-190, 391-392).

Petitioner apparently learned that he was a prime suspect in the disappearance and the killing of Valarie Armstrong and voluntarily went to the police station. Even prior to being advised of his rights Petitioner made certain contradictory statements which suggested a defense of alibi. (T. 413-507). Petitioner also consented to giving blood and hair samples. (T. 476-477), which were later determined to be similar to the hair samples found in the victim's vagina. (T. 339-342). However, the victim's blood type and that of Petitioner's were identical. (T. 336-364). Petitioner denied ownership of the knife found near Valarie's body, but this testimony was refuted by Patricia Brown, an acquaintance of Petitioner. (T. 346-350, 355-356, 493). Patricia Brown had been a former resident of Petitioner's building, and identified the knife, specifically recalling the taped handle, as the one she had used to cut up chicken when she went to Petitioner's house to cook for him. (T. 346-350, 355-356). Contradictory testimony was given by Petitioner's girlfriend, Diane Knight, who testified that she was forced by the police to state that the knife belonged to Petitioner. Ms. Knight testified that the knife found near the victim's body was not the knife which belonged to Petitioner. (T. 524-528).

Diane Knight's brother, Robert Butler testified that when his sister was living with Petitioner he made numerous visits to Petitioner's home, and on those occasions when he was in Petitioner's home he had never seen the knife which was found by the victim's body. (T. 557).

Petitioner in his testimony stated that when it got dark while he was working on his automobile in his back yard, which was approximately 7:00 p.m., he left his house and rode a bus to the home of Dennis Lonon. (T. 571). Petitioner denied ever having seen the victim on February 19, 1978. (T. 570-572). Petitioner stated that after he returned from Lonon's house he continued to work on his car, and then went to a local convenience store looking for a person who owed him some money. (T. 572-576-577). Petitioner also denied ever seeing the knife found near the victim's body. (T. 574-575). Petitioner also denied any conversation with the victim's stepfather, as well as denying any knowledge or implication in the killing of Valarie Armstrong. (T. 580-581).

At trial it was established that Petitioner had been residing at his home alone for several weeks prior to the murder, as his former roommate Alphonso Swinton had moved out sometime in January. The Petitioner confirmed on direct examination that his former roommate, Swinton, had moved out prior to the 1st of February. (T. 350, 426, 573).

The state in rebuttal called a police sergeant who stated that in a conversation with Diane Knight, Petitioner had told Diane Knight that she was not to identify the knife found near the victim's body as belonging to Petitioner. (T. 602-603). There was also further rebuttal testimony that Diane Knight had told police officers that she and Petitioner had been together all day on the day that Valarie Armstrong disappeared. (T. 619-620).

Additional facts as necessary for a more complete discussion of the issues presented in this appeal will be presented during the Argument and Citation of Authority portion of this brief.

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

A. THE EVIDENCE IN THIS CASE WAS SUFFICIENT TO PERMIT ANY RATIONAL TRIER OF FACT TO FIND EACH ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT. (Contention No. 1).

The evidence in Petitioner's trial when viewed in its entirety was sufficient to authorize any rational trier of fact to find Petitioner guilty beyond a reasonable doubt. Jackson v. Virgina, 443 U.S. 307 (1979). The evidence presented by both the State and the defendant during trial is before the reviewing body for consideration in determining the sufficiency of the evidence to sustain a conviction, including testimony presented on rebuttal by the State. Bethay v. State, 235 Ga. 371, 375, 219 S.E.2d 743 (1975).

Based on the foregoing statement of facts a chain of circumstances was established which excluded every reasonable theory of Petitioner's innocence beyond a reasonable doubt. The evidence when viewed against the background of Petitioner's testimony at trial, the inconsistent testimony of defense witness Diane Knight, along with the rebuttal testimony presented by the State, provided a sufficient basis for the jury's conclusion of guilt. The questions of credibility arising during the trial were obviously resolved by the jury against the Petitioner. Petitioner's contention that the testimony of Sabrina Williams lacked credibility was a matter for the jury to determine and is not a subject for appellate review. Curtis v. State, 244 Ga. 870-873, 165 S.E.2d 150 (1968).

After viewing all the evidence in a light most favorable to the State any rational trier of fact could have found the essential elements of the crimes for which Petitioner was convicted beyond a reasonable doubt. Jackson v. Virginia, supra.

B. THE EVIDENCE WAS SUFFICIENT TO PERMIT ANY RATIONAL TRIER OF FACT TO EXCLUDE EVERY REASONABLE HYPOTHESIS SAVE THAT OF PETITIONER'S GUILT. (Contention No. 2).

The Supreme Court of Georgia in Division 1 of its opinion found the evidence when viewed as a whole, was sufficient to authorize any rational trier of fact to find the Petitioner guilty beyond a reasonable doubt. In Division 15 of its opinion the court noted that the jury was correctly charged on circumstantial evidence and the reasonable hypothesis rule pursuant to Ga. Code Ann. § 38-109, and found that the evidence excluded every reasonable hypothesis save that of Petitioner's guilt. Finally, in Division 19 of its opinion the court held the trial judge did not err by admitting testimony concerning Alphonso Swinton. The court's ruling that testimony regarding Swinton was relevant and not objectionable was in response to Petitioner's Enumeration of Error No. 34, contending that any testimony regarding Swinton, the Petitioner's former roommate, was not relevant and its admission reversible error. The court in responding to the Petitioner's contention below noted: "The evidence introduced included proof that the hair found on the victim could have come from the Appellant's arm, but could not have come from Swinton's arm. Swinton was Appellant's roommate." This statement by the court was in part mistaken as to what appears in the record.

Although evidence was introduced showing the hair found on the victim was consistent with Nelson's hair, and could have come from him, no evidence was actually introduced excluding the hair as coming from Swinton. Also, Swinton had not been the Petitioner's roommate at the time of the murder, as he had moved out several weeks prior to the crime. (T. 573).

At trial Petitioner objected to the admission of the known hair sample taken from Swinton which had been examined by the

microanalysist, on the basis that no "link up" had been made connecting Swinton with the case. (T. 340, 341). Thereafter, the prosecutor omitted to examine the expert witness further regarding the hair sample taken from Swinton, nor did he move for its admission into evidence although it had been marked for identification.

Petitioner also objected to the testimony of Patricia Brown that Swinton was no longer living with Nelson on the basis of lack of relevancy. (T. 345). Upon appeal Petitioner did not challenge the sufficiency of the evidence as having failed to exclude the "hypothesis" that his former roommate, Swinton, may have committed the crime. Rather, Petitioner enumerated as error the admission of any testimony regarding Swinton for lack of relevancy:

> "The specific inclusion of references to him [Swinton] by Patricia Brown, including examination by Appellant's attorney, clearly established that he had no cognizable connection with Appellant in regard to any alleged connection with the crime, and the relevancy of such testimony was non-existent; and testimony should have been excluded and failure to do so constituted reversible error." (Appellant's Brief. Enumeration of Error No. 34).

At trial Petitioner objected to any testimony regarding Nelson's former roommate, Swinton, stating: "I'm going to enter some objections or make a continuing objection. I just don't see the relevancy of who Mr. Swinton was or what he has to do with it." (T. 345, 346).

Despite Petitioner's objection, it was established that Alphonso Swinton had moved out of the residence shared with Petitioner approximately six weeks prior to the murder. (T. 350, 426, 573). Petitioner upon direct examination admitted Swinton

had moved out several weeks prior to the date of the crime. (T. 573).

Now for the first time in this petition for a writ of certiorari, the Petitioner seeks to reverse course in mid-stream by contending that the evidence regarding Swinton was critical, and thereby capitalize upon the mis-statement in the court's opinion regarding the admission of the hair sample from Swinton. When Petitioner's contention is weighed against the fact that Swinton was not present nor residing at the residence where the victim was last seen alive, and Petitioner's previous protestations of lack of relevancy, it is submitted that Petitioner should not now be heard to complain. The question as propounded by Petitioner before the Georgia Supreme Court was simply an evidentiary question on the relevancy of testimony. The Petitioner contended that any testimony or mention of Swinton at trial was not relevant and reversible error. It is ironic that Petitioner now argues before this Court that no rational trier of fact could have ruled out Swinton as an equally reasonable hypothesis to that of Petitioner's guilt.

This contention conveniently ignores the fact that at trial Petitioner objected to any mention of Swinton as not relevant; that Swinton had moved away weeks prior to the murder; and the rebuttal testimony showing Petitioner's attempts to influence his girlfriend's testimony. Finally, based on the testimony and evidence actually presented to the jury, Petitioner attempts to equate a mere possibility with a reasonable hypothesis. The evidence showed Swinton to be at best a mere possible suspect and did not establish facts sufficient to amount to a "reasonable hypothesis."

The reasonably hypothesis rule as articulated by the Georgia courts does not require to sustain a conviction, that the evidence excludes every possibility or every inference that may be drawn

from the proven facts. Dunson v. State, 202 Ga. 515, 521, 43 S.E.2d 504 (1947). A mere possibility that someone other than the Defendant committed the crime is not such a reasonable hypothesis as must be excluded in order for circumstantial evidence to authorize the conviction of a defendant. Castleberry v. State, 152 Ga. App. 769, 264 S.E.2d 239 (1979).

The question of whether an alternative hypothesis is "reasonable" such as to require its exclusion prior to a finding of guilt is a question of fact for the jury. Harris v. State, 236 Ga. 242, 244, 223 S.E.2d 643 (1979). No better yardstick has been developed to determine what in a given case is a reasonable hypothesis than the collective opinion of twelve citizens. Petitioner's jurors were well aware that the evidence regarding Swinton's hair sample had not been admitted. The jury knew Swinton had not resided for several weeks at the house where the victim was last seen. Also, the jury was able to perceive that no hard evidence had been admitted pointing to Swinton as a reasonable hypothesis.

By its verdict the jury found the evidence excluded every other reasonable hypothesis save that of Petitioner's guilt. Petitioner should not now be allowed to reverse the course he set out upon at trial and on appeal of objecting to the relevancy of testimony regarding Swinton, and now create an entirely new position upon this petition for relief from this Court. A challenge based on his present contention, not previously enumerated as error upon appeal to the Supreme Court of Georgia, would not properly be before this Court. Cardinale v. Louisiana, 394 U.S. 437 (1969). Petitioner's contention remains without merit as the jury determined no viable alternative existed to its conclusion of Petitioner's guilt.

C. GA. CODE ANN. § 27-2534.1(b)(7) PERMITTING IMPOSITION OF A DEATH SENTENCE UPON A FINDING THAT A MURDER IS "OUTRAGEOUSLY OR WANTONLY VILE, HORRIBLE OR INHUMAN IN THAT IT INVOLVED TORTURE, DEPRAVITY OF MIND, OR AN AGGRAVATED BATTERY TO THE VICTIM" IS CONSTITUTIONAL. (Contention No. 3).

Georgia's death penalty statute has been held by this Court to be constitutional. Gregg v. Georgia, 428 U.S. 153 (1976). In Gregg, this Court found Ga. Code Ann. § 27-2534.1(b)(7) not to be unconstitutional on its face. Petitioner's contention that "Section (b)(7)" is unconstitutionally vague and overbroad remains without merit. The subsequent decisions of the Supreme Court of Georgia, in light of this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980), have sufficiently narrowed the construction of Section (b)(7) as to prevent an open ended interpretation of the statute. Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980). The guidance provided by the Supreme Court of Georgia in Hance v. State, supra, as to the interpretation of Section (B)(7) is a safeguard which satisfies the concerns expressed by this Court in Furman v. Georgia, 408 U.S. 238 (1972), and later in Godfrey v. Georgia, supra. Therefore, Petitioner's contention that the Georgia death penalty statute is unconstitutional remains without merit.

D. SECTION (b)(7) WAS CONSTITUTIONALLY APPLIED TO THE FACTS OF PETITIONER'S CASE. (Contention No. 4).

At trial the pathologist testified that multiple superficial shallow stab wounds were found on the right side of the victim's chest, which had been inflicted either before or after the deeper fatal stab wound. Death was not instantaneous upon infliction of the fatal wound, the child victim slowly bled to death for approximately thirty minutes. (T. 291-295). Severe physical damage had been suffered by the child to her mouth, rectum, and vagina. She had been raped and sodomized.

A review of the trial transcript fails to indicate that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. The introduction into evidence during the penalty phase of photographs of the victim taken shortly after she was found were admitted for the purpose of establishing the severity of the physical trauma inflicted upon the victim. The photos were probative of the fact that the murder was well within the "core" requirements of Section (b)(7), and the evidence clearly supported the jury's finding of the seventh aggravating circumstance, particularly in light of Godfrey v. Georgia, supra.

The facts portray a crime of such an evil and foul nature as to fall within the narrowest possible interpretation of the language of Section (b)(7). Petitioner's contention that the evidence does not support a finding of serious physical abuse before the child was killed, pales in light of the reality that the victim slowly bled to death. The crime clearly demonstrated the depravity of mind of Petitioner, whether he consumated his sexual assault before or after the child's death:

> "A defendant who mutilates or seriously disfigures the victim's body after death, or

commits a sex act upon the victim after death may be found to have a depraved mind and such acts would be sufficient to show depravity of mind of the defendant within the meaning of the statute.

Where it cannot be determined whether the victim was subjected to an aggravated battery or torture before death, or to mutilation and disfigurement after death, because the exact time of death or the precise act causing death cannot be ascertained, the penalty of death nevertheless may be sustained on the basis of aggravated battery or a serious physical abuse before death or depravity of mind demonstrated after death." Hance v. State, supra, at 862.

In determining whether the evidence supports the jury's finding of the Section (b)(7) aggravating circumstance the evidence must be sufficient to satisfy the first major component of the statute and at least one sub-part of the second component. Fair v. State, 245 Ga. 868, 268 S.E.2d 316 (1980); Hance v. State, supra, at 861. The jury found the evidence satisfied the first major component and all three of the sub-parts of the second component of the aggravating circumstance in Section (b)(7).

Consequently, this case is well within the guidelines of this Court's decision in Godfrey v. Georgia, supra. Petitioner's argument that the State failed to prove serious physical abuse of the victim prior to her death might be an interesting argument in the halls of academia, but ignores any decent society's collective judgment that a child molestation-murder is a crime of the most heinous and repulsive nature. The Petitioner's argument fails to distinguish the particular appropriateness of the Section (b)(7) finding in this case. Petitioner's contention that Section (b)(7) was not constitutionally applied to the facts of this case is without merit.

E. PETITIONER'S CONTENTION THAT THE TRIAL COURT'S JURY CHARGE CONFERRED UNBRIDLED SENTENCING DISCRETION ON THE JURY IS WITHOUT MERIT. (Contention No. 5).

Petitioner argues that the trial court did not sufficiently channel the jury's discretion as to the meaning and application of the seventh aggravating circumstance in light of Godfrey v. Georgia, supra. On two occasions the trial court instructed the jurors within the meaning of Godfrey v. Georgia, as to the definition under State law as to what constituted an aggravated battery. (T. 676-677). Furthermore, the Court in its charge at Page 678 defined mitigation as required under Hawes v. State, 239 Ga. 630, 238 S.E.2d 418 (1978). In addition, the jurors were instructed that even if they found beyond a reasonable doubt the existence of the statutory aggravating circumstance sought by the State, they could nonetheless recommend mercy. (T. 678).

In Cape v. State, 246 Ga. 520, 272 S.E.2d 487 (1980), the Supreme Court of Georgia was provided with an opportunity to address this issue regarding the alleged need for a limiting instruction on the Section (b)(7) aggravating circumstance. In Cape, supra, citing Godfrey v. Georgia, supra, the Supreme Court of Georgia reiterated that "the validity of the Petitioner's death sentence turns on whether, in light of the facts and circumstances of the murder . . ., the Georgia Supreme Court can be said to have applied a constitutional construction of [27-2534.1(b)(7)]."

In this Petitioner's case, unlike in Godfrey v. Georgia, supra, the jury returned a full and proper finding of the Section (b)(7) circumstance, thereby alleviating any necessity for speculation by the appellate court as to the jury's interpretation of any partial finding of Section (b)(7). With the necessity for speculation by the appellate court removed,

rational review of the imposition of the death penalty becomes possible and the fatal defect of Godfrey v. Georgia, supra, is removed. Thus, Petitioner's contention that the Court's instruction failed to limit the sentencing discretion of the jury is without merit.

F. THE TRIAL COURT WAS CORRECT IN PERMITTING THE JURORS TO VIEW PHOTOGRAPHS OF THE VICTIM TO ACCESS WHETHER THE STATE HAD PROVEN BEYOND A REASONABLE DOUBT THAT THE MURDER WAS OUTRAGEOUSLY OR WANTONLY VILE, HORRIBLE OR INHUMAN IN THAT IT INVOLVED TORTURE, DEPRAVITY OF MIND OR AN AGGRAVATED BATTERY TO THE VICTIM. (Contention No. 6).

To establish the aggravated nature of the wounds sustained by the six year old victim, specifically the stab wounds, the wounds to the mouth, and the severe physical trauma from the sexual assault, the State introduced into evidence photographs of the victim, during the penalty phase of the trial. Though gross in character, the photographs were limited solely for the purpose of showing the nature and extent of the wounds inflicted, the depravity of mind on the part of Petitioner, and not for the purpose of inflaming the juror's passion. The relevancy and probative value of the photographs in establishing the aggravating circumstance in the penalty phase, clearly outweighed any alleged prejudicial effect. The jury was entitled to understand the enormity of Petitioner's crime and the particular appropriateness of the language of Section (b)(7) to this case.

The photographs were admissible under Georgia law, relevant to the jury's determination, and their admission did not violate the Eighth and Fourteenth Amendments. Cobb v. State, 244 Ga. 344, 260 S.E.2d 60 (1979); Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, (1979). The Petitioner's contention that the admission of the photographs during the penalty phase of trial constitutes a constitutional question remains without merit.

G. THE READING OF A TRANSCRIPT OF PETITIONER'S RECORDED STATEMENT TO POLICE DID NOT VIOLATE HIS RIGHT TO DUE PROCESS, AND THIS CONTENTION SHOULD NOT NOW BE CONSIDERED AS PETITIONER ABANDONED HIS CONTENTION REGARDING ALLEGED INACCURACIES IN THE TRANSCRIPT UPON APPEAL. (Contention No. 7).

Upon appeal to the Supreme Court of Georgia, the Petitioner enumerated as error the reading of a transcript of Petitioner's recorded statement, due to alleged inaccuracies contained therein, without corrective charges to the jury. (Petitioner's Enumeration of Error No. 35). Thereafter, upon submission of his brief the Petitioner specifically abandoned any allegation of error as to alleged inaccurate statements of fact in the reading of the transcript of Petitioner's recorded statement:

> "Since examination of the police officer regarding the statement included evidence that fingerprints were not in fact found, as well as other corrections made as to allegations of interrogating officers, Enumerated Error Number Thirty-Five is hereby abandoned." (Appellant's brief. Enumeration of Error No. 35).

In addition to withdrawing his contention regarding the reading of the transcript as to allegations made by police officers contained therein, the Petitioner did not raise any allegation of prosecutorial misconduct upon appeal to the Supreme Court of Georgia. Now for the first time Petitioner seeks to raise an allegation of error not previously addressed to the court below. After having voluntarily and expressly abandoned any contention regarding alleged inaccurate statements by interrogating officers contained in the transcript, the Petitioner should not now be allowed to raise this contention for the first time. Thus, any such challenge based on alleged inaccuracies in the transcript

or prosecutorial misconduct presented for the first time here in this instant petition would not properly be before the Court. Cardinale v. Louisiana, 394 U.S. 437 (1969). Upon appeal the Petitioner only enumerated and argued as error the reading of the transcript of Petitioner's statement, as opposed to the playing of the actual tape recorded statement. (Appellant's Enumeration of Error No. 8). The Petitioner asserted below that the reading of the transcript did not establish the mood, manner and method of speaking. Petitioner's only concern below was that the inflections contained in the speaker's voices could not be discerned by a reading of the transcript. As noted by the Supreme Court of Georgia the tapes were played to the jury, but portions were unintelligible. The trial judge then allowed the reading of the transcript, and no objection was made by defense counsel.

Petitioner's present contention of prosecutorial misconduct not having been previously presented upon appeal, it should not now be considered and remains without merit as shown by his abandonment on appeal of any alleged error as to misstatements of fact by officers contained in the transcript.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court deny the petition for a writ of certiorari which has been filed on behalf of Petitioner, Gary X. Nelson.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles E. Brown, Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States I have this day served a true and correct copy of this Brief for the Respondent in Opposition upon the Petitioner's attorney by depositing a copy of the same in the United States mail with proper address and adequate postage to:

Allan R. Freedman
Donovan Leisure Newton & Irvine
30 Rockefeller Plaza
New York, New York 10112

This 27th day of July, 1981.

CHARLES E. BROWN
Staff Assistant Attorney General

In the Supreme Court of Georgia

Decided: JAN 27 1981

36555. NELSON v. THE STATE.

MARSHALL, Justice.

The appellant, Gary X. Nelson, was convicted of murder, aggravated sodomy, and rape. The jury found that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Code Ann. § 27-2534.1(b)(7). The appellant was given the death penalty for the murder conviction, and he was given consecutive life sentences for the rape and aggravated-sodomy convictions.

The state presented evidence at trial to the following effect:

The victim was a six-year-old girl, and the appellant and the victim's family were neighbors, living one-half block from each other.

The victim was reported missing on the evening of Sunday, February 19, 1978. On that morning, the appellant had gone to the victim's home to borrow a wrench from her stepfather, Ray McCray. There is testimony that the appellant drank some vodka at the McCray residence, and then Mr. McCray accompanied the appellant back to the appellant's house to help the appellant do some work on his Volkswagen. Around dusk, they returned to the McCrays. Mr. McCray testified that his children were playing in the yard and he pointed the victim out to the appellant, stating, "That's my little girl right here." McCray testified that the appellant replied, "Yeah, I know, that's my little buddy because she comes down to the house all the time to go to the store for us." According to Mr. McCray's testimony, the appellant then went back into the McCray residence, had another drink of vodka, and then returned to his own home.

EXHIBIT A

Sabrina Williams, who is eight years old, testified that she was playing with the victim around dusk on the Sunday the victim disappeared. She and the victim went to the store, but the victim did not have any money. Sabrina testified that on their way back from the store, the victim left her in order to go to the appellant's house to get some money. The victim referred to the house as "Uncle Al's house." The appellant's roommate was Alphonso Swinton. The last time Sabrina saw the victim, the victim was walking toward this house and there was a man working on a Volkswagen in the yard. A few days later, Sabrina identified the appellant from a photographic array as the man working on the Volkswagen. However, she testified at trial that the appellant was not the man.

The victim's body was discovered in a wooded area near her house on Monday, February 20th. The victim had been brutally raped, sodomized, and stabbed. A distinctive-looking knife with tape wrapped around its handle was found within several feet of the body. Seminal fluid found on the victim's coat contained a blood type which is the same blood type as the appellant's, which is blood type O. (There is evidence that 44% of the population have this blood type.) Forensic evidence established that a hair found on the victim could have come from the appellant's arm, but could not have come from the arm of the appellant's roommate, Alphonso Swinton. (There is evidence that approximately 123 people in the area would have similar hair samples.)

There is testimony that during the police investigation of the case, the appellant's girl friend, Diane Knight, identified the knife found at the scene of the murder as being the appellant's knife. An investigating police officer also testified that Diane Knight informed the police that the appellant had instructed her not to identify the knife. At trial, she repudiated her earlier statement to the police that the knife was the appellant's, and she testified that this was not the appellant's knife. However, there was

testimony from another witness that this was the knife in the appellant's house. At trial, Ms. Knight also repudiated a pre-trial statement which she had given to the police in which she maintained that she had been with the appellant during the day and evening of February 19. Ms. Knight testified at trial that she had not been with the appellant during this time.

The victim's stepfather testified that on Tuesday, February 21, he received an anonymous telephone call from a person whom he identified as the appellant. McCray testified that the appellant told him that "a fellow on the east side by the name of Blue" killed his daughter. It was later determined by the police that the person identified as "Blue" could not have committed the crime.

The appellant testified at trial. He denied that he knew the victim by name or that she came to his house often. And, he denied telling this to Mr. McCray. He also denied being at the McCray residence on Sunday, February 19. However, he did admit that it was he who was working on his Volkswagen on that day.

Held:

1. The evidence, when viewed as a whole, is sufficient to authorize a rational trier of fact to find the appellant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979).

2. The trial judge did not abuse his discretion in setting bail at $10,000. See Code Ann. § 27-901k; Smith v. State, 245 Ga. 168 (2) (263 SE2d 910) (1980); Harris v. Hooper, 236 Ga. 389 (224 SE2d 1) (1976).

3. The trial judge did not err in overruling the appellant's motion for acquittal on the ground that two grand juries had returned no-bills of indictment. Nor did the trial judge err in overruling his motion to dismiss for denial of the appellant's constitutional right to a speedy trial.

The appellant was arrested on May 26, 1978. On December 10, 1978, he filed a demand for indictment, and on April 4, 1979,

he was ordered released from incarceration pursuant to his writ of habeas corpus for failure of the grand jury to indict him. It appears that the grand jury deferred voting on the bill of indictment against the appellant in order to permit the district attorney further time for investigation, in that a key witness, Diane Knight, could not be located. On October 3, 1979, the grand jury returned a bill of indictment against the appellant for murder. This case came on for trial on February 27, 1980.

It is true that two returns of no bills by a grand jury generally bars further prosecution for the same offense. Code Ann. § 27-702. However, a mere failure of the grand jury to indict does not constitute the return of a no bill. Chaffin v. Jones, 243 Ga. 267 (253 SE2d 389) (1979). Accordingly, the trial judge did not err in overruling the appellant's motion for acquittal.

Nor do we find the appellant's Sixth Amendment right to a speedy trial to have been violated. Barker v. Wingo, 407 U.S. 515 (92 SC 2182, 33 LE2d 101) (1972), sets out the factors for determining whether there has been a denial of the Sixth Amendment right to speedy trial:

(1) Length of delay -- The length of delay between appellant's arrest and his trial was 22 months. However, during some of this time he was in jail under a conviction of involuntary manslaughter. He was released on habeas corpus approximately 10 months prior to trial.

(2) Reason for delay -- The reason for the delay in the return of the indictment was that a key witness could not be located. This is a legitimate reason for delay and does not constitute deliberate prosecutorial delay for tactical advantage. Cf., United States v. Marion, 404 U.S. 307 (92 SC 455, 30 LE2d 468) (1971); Haisman v. State, 242 Ga. 896 (2) (252 SE2d 397) (1979).

(3) Assertion of right -- The appellant asserted his right to speedy trial by filing a demand for indictment several months after his arrest.

(4) Prejudice -- The appellant was released approximately 10 months prior to trial, and during the approximately 10 months he was in jail, he was serving time on another charge. He has not shown any way in which his defense was impaired by the delay.

Considering all of these factors, we hold that the trial judge did not abuse his discretion in ruling that the appellant has not been denied his Sixth Amendment right to a speedy trial. See Jackson v. State, 244 Ga. 276 (2) (260 SE2d 15) (1979).

4. After an in-camera inspection of the prosecutor's files, the trial judge supplied the defense with all evidence found to be material under Brady v. Maryland, 373 U.S. 83 (83 SC 1194, 10 LE2d 215) (1963). In addition, the prosecutor provided the defense with all writings and tangible objects required to be produced under the appellant's Code Ann. § 38-801(g) notice to produce. Hamby v. State, 243 Ga. 339 (2) (253 SE2d 759) (1979); Brown v. State, 238 Ga. 98 (231 SE2d 65) (1976). The appellant has not made a showing of any evidence withheld under Brady or any material which was required to be, but not, produced under the notice to produce. We find no error here.

5. Although the state is not required to serve a defendant with notice of the statutory aggravating circumstance it intends to prove, Bowden v. Zant, 244 Ga. 260 (15C) (260 SE2d 465) (1979), the appellant did receive notice of the state's intent to proceed under § 27-2534.1(b)(7) here.

6. The trial judge did not abuse his discretion in overruling the motion for change of venue.

There is no evidence in the record that there was such widespread, adverse, pretrial publicity that the prospective jurors could not lay aside their opinions and render a verdict based solely on the evidence. Only 38 prospective jurors were examined before a jury was struck, and only seven of these prospective jurors were excused for being prejudiced or having a fixed opinion as to guilt or innocence. This low

dismissal rate corroborates the absence of such prejudicial pretrial publicity as would require the grant of the appellant's motion for change of venue. Murphy v. Florida, 421 U.S. 794 (95 SC 1555, 43 LE2d 772) (1974); Tucker v. State, 244 Ga. 721 (12) (261 SE2d 635) (1979); Collier v. State, 244 Ga. 553, 572 (261 SE2d 364) (1979). In addition, the prospective jurors were carefully questioned in order to ensure that the jurors selected to try the case were not prejudiced by pretrial rumors. See Chenault v. State, 234 Ga. 216 (5) (215 SE2d 223) (1975).

7. Two prospective jurors were properly excused for cause under Witherspoon v. Illinois, 391 U.S. 510 (88 SC 1770, 20 LE2d 776) (1968) and Lockett v. Ohio, 438 U.S. 586 (98 SC 2954, 57 LE2d 973) (1978). This did not deprive the appellant of his right to a jury selected from a representative cross-section of the community. Bowen v. State, 244 Ga. 495 (3) (260 SE2d 855) (1979).

8. The trial judge did not commit error in refusing to strike for cause a prospective juror who stated on voir dire that he believed the burden of proof on the state to be too high, in that this prospective juror further stated that he could lay aside his personal opinions as to the burden of proof that the state had to bear and follow whatever instructions the trial court might give him as to the burden of proof.

9. The photographic array shown to Sabrina Williams by the police was not impermissibly suggestive. Therefore, the trial judge did not err in overruling the appellant's motion to suppress Sabrina's pretrial identification of the appellant from the photographic array. McClesky v. State, 245 Ga. 108 (2) (263 SE2d 146) (1980); Gravitt v. State, 239 Ga. 709 (4) (239 SE2d 149) (1977).

Nor can we say that the trial judge committed error in allowing a photograph of the appellant to be introduced as an exhibit at trial, in that the trial judge found that this was the photograph which Sabrina Williams had picked out of the photographic array.

10. The trial judge did not abuse his discretion in admitting transcripts of pretrial statements given by the appellant to the police. United States v. Wilson, 578 F2d 67 (5th Cir. 1978).

Defense counsel sought to have tape recordings of these statements admitted in lieu of the transcripts, because the defense asserted that the voice inflections of the appellant and those conducting the interrogation would reveal the confusing nature of the interrogation. The tapes were played to the jury, but portions of the tapes were unintelligible. The trial judge then allowed the transcripts to be read into evidence. No objection was made by defense counsel at trial. We find no abuse of discretion on the part of the trial court in admitting the transcripts.

11. The trial judge's failure to give the appellant's request to charge under Williams v. State, 11 Ga. App. 662 (75 SE2d 988) (1912), was not error.

Williams holds that without corroboration one cannot be convicted of a crime upon hearsay testimony as to statements of a child who is incompetent as a witness because too young to appreciate the nature and sanctity of the oath. In this case, there is corroboration of Sabrina Williams' testimony and her pretrial statements. In addition, she was not found to be incompetent as a witness. Therefore, the pronouncements of law in Williams are not correct statements of law as applied to the facts of this case. Accordingly, the trial judge did not err in refusing to give the request to charge. Dampier v. State, 245 Ga. 427 (265 SE2d 565) (1980).

12. Since the appellant's other requests to charge were given in substance by the trial judge, the failure to charge in exactly the language requested was not error. E.g., Mason v. State, 236 Ga. 46 (5) (222 SE2d 339) (1976).

13. The trial judge did not abuse his discretion in admitting in evidence at the presentence hearing, photographs depicting the injuries to the victim. E.g., Tucker v. State, 245 Ga. 63 (263 SE2d 109) (1979); Mooney v. State, 243 Ga. 373 (254 SE2d 337) (1979).

14. The trial judge correctly charged the jury on mitigating circumstances at the presentence hearing. See Hance v. State, 245 Ga. 856 (268 SE2d 339) (1980); Collins v. State, 243 Ga. 291 (253 SE2d 729) (1979).

15. Imposition of the death penalty on circumstantial evidence alone is not unconstitutional. Douthit v. State, 239 Ga. 81 (6) (235 SE2d 493) (1977), cert. denied, Douthit v. Georgia, 445 U.S. 938 (1980).

The jury was charged on circumstantial evidence and the reasonable hypothesis rule pursuant to Code § 38-109. We agree that the evidence excludes every reasonable hypothesis save that of guilt.

16. The appellant's consecutive life sentences for rape and aggravated sodomy do not violate the Eighth Amendment's ban on cruel and unusual punishment. Crawford v. State, 236 Ga. 491 (224 SE2d 365) (1976).

17. Georgia's death penalty statute has been held on numerous occasions to be constitutional. Gregg v. Georgia, 228 U.S. 153 (96 SC 2909, 49 LE2d 859) (1976). Willis v. State, 243 Ga. 185 (10) (253 SE2d 70) (1979).

18. The method of execution in this state does not constitute cruel and unusual punishment. Collier v. State, 244 Ga. 553 (18) (261 SE2d 364) (1979).

19. The trial judge did not err in admitting the evidence concerning Alphonso Swinton. The evidence introduced included

proof that the hair found on the victim could have come from the appellant's arm, but could not have come from Swinton's arm. Swinton was the appellant's roommate. In order for the state to prove its case against the appellant, it was necessary for the state to exclude the possibility that Swinton, who also had access to the murder weapon, could have committed the murder. The evidence concerning Swinton was, therefore, relevant to the issue of the appellant's guilt or innocence of the murder charge.

Sentence Review:

From a review of the record and transcript, we conclude that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

In this case, the evidence shows that the appellant brutally murdered a six-year-old girl through the infliction of multiple stab wounds. Prior to being killed, the victim was raped and sodomized. Her vagina, rectum, as well as other parts of her body, were severely bruised and bleeding; her lips were torn from her teeth (lacerations or tears of her lips); and it took approximately 30 minutes after the infliction of a deep stab wound to her chest for her to bleed to death. From the evidence, the jury was fully authorized in finding that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." See generally Hance v. State, 245 Ga. 856, supra. The verdict is factually substantiated.

In reviewing the death penalty in this case, we have considered cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that the following similar cases listed in the appendix support the affirmance of the death penalty in this case. The appellant's sentence to death for murder is not excessive or disproportionate, considering both the crime and the defendant.

Judgment affirmed. All the Justices concur, except as to Division 5. Hill, P.J., concurs specially. Gregory, J., not participating.

APPENDIX.

House v. State, 232 Ga. 140 (205 SE2d 217) (1974); Presnell v. State, 241 Ga. 49 (243 SE2d 496) (1978); Griggs v. State, 241 Ga. 317 (245 SE2d 269) (1978); Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1978); Bowen v. State, 244 Ga. 495 (260 SE2d 855) (1979); Patrick v. State, 245 Ga. 417 (265 SE2d 553) (1980); Thomas v. State, 245 Ga. 688 (266 SE2d 499) (1980); Hill v. State, 246 Ga. 402 (271 SE2d 802) (1980); Cape v. State, 246 Ga. 520 (SE2d) (1980).

36555. NELSON v. THE STATE.

HILL, Presiding Justice, concurring specially.

Although the state is not required to serve a defendant with notice of the statutory aggravating circumstance it intends to prove, Bowden v. Zant, division 15c, supra, the state is required to make known to the defendant prior to the beginning of the trial the additional evidence it will introduce in aggravation of punishment during the sentencing phase of trial. Code § 27-2503. I therefore concur in division 5 of the majority opinion in this case. See Bowden v. Zant, supra, Hill, J., concurring specially, 244 Ga. at 265.

HILL, Presiding Justice, concurring specially.

I concur specially as to divisions 5 and 15.

(5) Although the state is not required to serve a defendant with notice of the statutory aggravating circumstance it intends to prove, Bowden v. Zant, division 15C, supra, the state is required to make known to the defendant prior to the beginning of the trial the additional evidence it will introduce in aggravation of punishment during the sentencing phase of trial. Code § 27-2503. I therefore concur in division 5 of the majority opinion in this case. See Bowden v. Zant, supra, Hill, J., concurring specially, 244 Ga. at 265.

(15) In this case the evidence is circumstantial as to the defendant's guilt, not as to the aggravating circumstance. Compare Douthit v. State, 239 Ga. 81 (6) (235 SE2d 493) (1977). The evidence as to the aggravating circumstance was direct (multiple stab wounds, etc.). Thus, in this case the circumstantial evidence issue directly affects only the defendant's conviction.

Convictions based upon circumstantial evidence are not unconstitutional, so long as " . . . the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude . every other reasonable hypothesis save that of . . . guilt. . . .", Code § 38-109, and so long as, after viewing the evidence in the light most favorable to support the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307 (SC , LE2d) (1979). See divisions 1 and 15 of the majority opinion.

Like this court, other courts have affirmed death penalties where the evidence of guilt was circumstantial. State v. Perry, 199 Neb. 656 (261 NE2d 95, 100) (1977), cert. den. 439 U. S. 882 (SC , LE2d) (1978); Thomas v. State, 374 So2d 508, 513 (Fla. 1979), cert. den. ____ U. S. ____ (SC , 64 LE2d 249) (1980); State v. Carriger, 123 Ariz. 335 (599 P2d 788) (1979), cert. den. 444 U. S. 1049 (SC , LE2d) (1980).

I therefore concur in division 15 of the majority opinion.